

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES BANCHERI	:	DETERMINATION
	:	DTA NO. 819619
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1999 through May 31, 2001.	:	

Petitioner, James Bancheri, 64 Midwood Avenue, Farmingdale, New York 11735-5351, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1999 through May 31, 2001.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed December 3, 2003, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). Petitioner, who appeared by his representative, Angela Cowan, CPA, had 30 days, or until January 2, 2004, to respond to the motion but did not do so. The 90-day period for issuance of this determination commenced on January 2, 2004. After due consideration of the documents and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation issued a timely Notice of Determination to petitioner for additional sales and use taxes for the period September 1, 1999 through May 31, 2001.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, James Bancheri, a Notice of Determination, dated November 22, 2002, and addressed to petitioner at “64 Midwood Ave Farmingdale, NY 11735-5351.” The notice bore assessment identification number L-021711943-8 and asserted a total amount due of \$21,018.33. As indicated by the computation summary section of the notice, this amount consisted of sales and use taxes assessed of \$18,075.78, plus interest of \$2,942.55, for the period September 1, 1999 through May 31, 2001.

2. By letter, dated November 27, 2002, the Bureau of Conciliation and Mediation Services (“BCMS”) notified petitioner that it was not necessary for him to file a request for conference since the corporation of which he was a responsible officer had already filed for same. A BCMS conference was conducted in the Matter of the Request of James Bancheri on March 17, 2003.

3. On July 18, 2003, BCMS issued a Conciliation Order modifying the notice of determination and recomputing the amount of tax due to the sum of \$12,315.62, plus interest.

4. On August 25, 2003, petitioner filed a petition with the Division of Tax Appeals in which he protested the additional tax found due, as modified at conference, on the basis that petitioner had never received a notice of determination until the date of the conference, March 17, 2003, and that the Division was precluded by the statute of limitations from assessing additional taxes for the period in issue.

5. Petitioner's address as set forth on his 2001 New York State Resident Income Tax Return, filed on June 19, 2002, was 64 Midwood Avenue, Farmingdale, NY 11735-5351, the same address given on the subject Notice of Determination.

6. Notices of determination, such as the one at issue herein, were computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also included the preparation of a certified mail record ("CMR"). The CMR listed those taxpayers to whom notices of determination were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

7. Each computer-generated notice of determination was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The CMR listed an initial date (the date of its printing) in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. In this case, this date was entitled "Run: 20023161700," signifying the year, Julian day of the year and the military time (November 12, 2002). This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date of November 12, 2002 which was manually changed to November 22, 2002.

8. After a notice of determination was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighed and sealed each envelope

and affixed postage and fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark or his signature or initials, or both, to the CMR.

9. In the ordinary course of business a Mail Processing Center employee picked up the CMR from the post office on the following day and returned it to the CARTS Control unit.

10. In the instant case, the CMR was a six-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR lists 58 control numbers. Each such certified control number was assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

11. Information regarding the Notice of Determination issued to petitioner was contained on page four of the CMR. Corresponding to certified control number 7104 1002 9739 0138 1549 was notice number L 021711943, along with petitioner's name and an address, which was identical to that listed on the subject Notice of Determination.

12. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated November 22, 2002, and the initials of the postal employee, verifying receipt of the items.

13. The last page of the CMR, page six, contained a pre-printed entry of “58” corresponding to the heading “Total Pieces and Amounts Listed.” This pre-printed entry was manually circled and beneath it was the aforementioned postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee. These same initials appeared on all pages of the CMR.

14. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the “58” indicated that all 58 pieces listed on the CMR were received at the post office.

15. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

16. The facts set forth above in Findings of Fact “6” through “15” were established through the affidavits of Geraldine Mahon and Bruce Peltier. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of determination. Mr. Peltier was employed as a Mail and Supply Supervisor in the Registry Unit of the New York State Department of Taxation and Finance. Mr. Peltier’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where "a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient." This section further provides that such a notice "shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state." In this case, the record is clear that the address listed on the subject Notice of Determination was petitioner's last known address. Petitioner listed the same address on his New York State Resident Tax Return, filed on June 19, 2002, only five months prior to the issuance of the notice herein.

D. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination.

E. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination in issue was mailed to petitioner on November 22, 2002.

Specifically, this six-page document listed certified control numbers with corresponding names and addresses, including petitioner's control number, notice of determination number, name and address. All six pages of the CMR bore a U.S. Postal Service postmark dated November 22, 2002. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page six of the CMR and circled "58" on that page to indicate receipt by the post office of all 58 pieces of mail listed thereon (*cf.*, ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject Notice of Determination on November 22, 2002.

F. Since the Division has established both the fact and date of mailing the notice herein, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see*, ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). Petitioner has offered no evidence to rebut this presumption.

G. Petitioner's argument that the Division issued the Notice of Determination beyond the statute of limitations must fail. Tax Law § 1147(b) provides that no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return. Since the earliest period for which petitioner was assessed ended on November 30, 1999, the return for that period was due on December 20, 1999. It has been established that the Division issued the notice to him on November 22, 2002, within three years of the filing dates for all return periods covered by the assessment. Therefore, the Division's issuance of the notice was timely.

H. The Division's Motion for Summary Determination is granted, the petition of James Bancheri is denied and the Notice of Determination, dated November 22, 2002, as modified by the Conciliation Order, is sustained.

DATED: Troy, New York
January 22, 2004

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE